SUPREME COURT
FIRST DIVISION

MANUEL DE LEON,
***Petitioner*,**

-versus-

G.R. No. L-13238.
November 24, 1917

VICENTE NEPOMUCENO, judge of first instance of Tarlac, and SANTIAGO DE JESUS, provincial sheriff,
***Respondents*.**
x----------x

D E C I S I O N

CARSON, *J.*:

SEPARATE OPINION:

***MALCOLM, J., concurring*.:**

Judgment for costs was rendered in the Court of First Instance of Tarlac in as election contest proceeding in the following terms:

> "Las costas y gastos de la protesta se pagaran por el protestado y tercerista. (The costs and expenses of the contest will be paid by the protestee and the intervener.)"

The judgment entered in these contest proceedings was appealed to this court and in due course the judgment, including the provision for the payment of costs and expenses of the contest, was affirmed. The record was returned to the Court of First Instance of Tarlac and upon its return the judgment became final.

Petitioner, the protestee, alleges that the sheriff of the Province of Tarlac, with the express approval of the respondent judge of the court of first instance of that province, is proceeding to enforce the above-cited judgment against him as though it were a "joint and several" judgment for costs and expenses and not merely a "joint" judgment, and petitioner prays that the respondent be restrained from all further attempts to enforce the judgment for costs as a "joint and several" judgment.

To the petitioner's prayer for relief the respondents demur, and in the course of the argument in support of the demurrer various questions have been raised as to the nature and extent of the authority of the courts to tax costs and expenses in election contests. It is urged on the one hand that, when third persons are brought into election contest proceedings by notice, the court may tax costs against them in like manner to that in which costs are fixed against the losing parties in other actions. On the other hand, it is contended that, when third persons are brought into election contest proceedings by notice, the question of their liability for costs depends wholly upon their conduct thereafter; and it is said that if they decline to exercise their right to intervene, or if in fact they do not voluntarily take any part in the proceedings the court should not tax any part of the costs against them.

So also conflicting contentions have arisen in the course of the discussion as to whether, in the event that such third persons do in fact intervene and take an active part in the election contest, the court should tax the costs jointly and severally against all the losing parties, or in proportion to the costs and expenses resulting from their respective activities, or upon such other basis as the particular circumstances of the case would seem to require.

We are of opinion, however, that it is not necessary for us to consider or decide any of those contentions at this time. The only question before us is whether the judgment actually entered by the court below and affirmed upon appeal is or is not a "joint and several" judgment. If it is "joint and several" the petitioner has no cause of action in support of his prayer for relief from its enforcement by the levy of execution upon his goods. If it is not a "joint and several "judgment, and if, as the petitioner contends, it is merely a "joint" judgment, he is clearly entitled to relief from any attempt in the court below to enforce it as a "joint and several" judgment.

It is admitted by the demurrer, and clearly appears from the record that the judgment has become final and unappealable. The parties cannot, therefore, be heard at this time to urge that, under the law of the facts, some other judgment should have been entered than that which was in fact entered, and which has long since become final and unappealable. Contentions of this kind, if well founded, should have been advanced while the judgment was open for reconsideration in the court below, or while the record was before us on appeal. (Cf. Ruling upon supplemental motion in Manila Railroad. Co. vs. Alano, 36 Phil. Rep., 500.)

Examining the language statement of the judgment for cost, which is set out in the foregoing statement of facts, it is manifest that it is merely a joint judgment against the protestado y tercerista, and does not permit of construction or interpretation as a "joint and several" judgment. No argument is necessary. It is sufficient to cite here articles 1137 and 1138 of the Civil Code as to the rule in this jurisdiction.

> "ART. 1137. The concurrence of two or more creditors, or of two or more debtors, in a single obligation, does not imply that each one of the former has a right to ask, nor that each one of the latter is bound to comply in full with the things which are the objects of the same. This shall only take place when the obligation determines it expressly, being constituted as a joint and several obligation.
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> "ART. 1138. If from the context of the obligation referred to in the preceding article, any other thing does not appear, the

> credit or the debt shall be presumed as divided in as many equal parts as there are creditors or debtors, and shall be considered as credits, or debts, each one different from the other."
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> "A joint obligation under the law of Louisiana binds the parties thereto only for their proportion of the debt, whilst a solidary obligation, on the contrary, binds each of the obligors for the whole debt." (Groves vs. Sentell, 14 Sup. Ct., 898, 901; 153 U. S., 465; 38 L. ED., 785.)

From what has been said, it is manifest that the demurrer must be overruled, and that unless the respondents file an answer within ten days from the entry of this opinion (which we do not anticipate) judgment should be entered securing to petitioner the relief to which he is entitled upon the facts disclosed by the petition.

Unless an answer is filed within ten days from the entry of this order, let judgment be entered dissolving the preliminary injunction heretofore allowed in these proceedings, and directing the respondents to refrain from any further measures looking to the enforcement of the judgment for costs and expenses in the election contest proceedings had in the Court of First Instance of Tarlac, wherein Ernesto Gardiner was protestant, and Manuel de Leon was protestee, and Cecilio Torres was cited to appear as intervener or tercerista, as a "joint and several" judgment for costs and expenses, directing the respondent judge to enter such orders, as may be convenient or necessary to revoke and set aside any order or orders heretofore entered in the Court of First Instance of the Province of Tarlac looking to the enforcement of that judgment as a "joint and several" judgment. The costs of these proceedings will be taxed against the respondent sheriff, Santiago de Jesus. So ordered.

Arellano, *C.J.*, Torres, Araullo, and Street, *JJ.*, concur.

SEPARATE OPINION

MALCOLM, J., concurring:

The majority decision says only that this court will not disturb a certain judgment entered by a Court of First Instance and affirmed upon appeal by the Supreme Court. For fear that what is found in this decision may be taken as indicating approval of such a judgment, I am constrained to explain my views regarding the fixing of costs in election contests.

The facts herein are simple. Three candidates for provincial governor of Tarlac. De Leon declared elected. Contest by Gardiner against De Leon with notice to the third candidate Torres. Gardiner wins. Expenses and costs taxed. It is found that Torres, the third candidate, is insolvent. The point, as resolved by this court under certiorari and injunction proceedings, is that De Leo is only liable under a ""joint" judgment.

The law is plain. An election contest is a special, summary proceeding. It is not an "action" as we think of this term in pleading and practice. The Election Law provided within itself a complete procedure for the determination of election contest. Sections 481 and 482 of the present Administrative Code state explicitly how the costs shall be taxed. Although the practice in election contests is well known, let us elucidate succinctly.

The contest of an election is begun by motion with notice. This is exactly what Gardiner, the protestant, did in an endeavor to obtain possession of the office of provincial governor. Torres, the third candidate, was merely an unwilling party to the action. In reality, he was not technically a party to the contest nor an intervener in the proceeding. Before the court could entertain this motion, the party making the motion, i. e. Gardiner, was required to give bond in an amount fixed by the court with two sureties satisfactory to it "conditioned that he will pay all expenses and costs incident to such motion." The protestant is also permitted to deposit cash in lieu of

such bond. If, therefore, Gardiner had been unsuccessful, provision was made for the paying of the costs by him. The law also looks after the opposite possibility. Thus, it is provided that "if the party paying such expenses and costs shall be successful, they shall be taxed by the court and entered and be collected as a judgment against the defeated party." This language is easily understandable. There can be no question as to who or what is meant by "defeated party." The person in office, in this case De Leon, who is ousted, is the defeated party. The law thus provides how the costs shall be paid if the protestant is unsuccessful. In neither instance is a third party candidate involved. Suppose for example that is this particular contest instead of Torres the third candidate being found to be insolvent, it had happened that De Leon was found to be insolvent, the result would be that Torres, a candidate who received a few complimentary votes, who was brought into the contest only by notice, and who had no chance of being declared elected, would have been forced to pay all the costs of the proceedings.

The fixing of costs in election contests is therefore not a question of joint or several liability or of joint liability, but is simply an application of the precise provisions of the law to the facts.